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IN THE

Supreme Court of the United States

October Term, 1969

No. 86

MELVIN MORALES,

Petitioner,

against

NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Question Presented

1. Did the admission into evidence of sundry types of confessions made by the petitioner violate his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

Statement of the Case

A. Prefatory Note Pertaining to the History of This Litigation

On August 4, 1964, one Addie Brown was murdered in the elevator of her Bronx County apartment house by an assailant who stabbed her repeatedly. After investigation, the petitioner Melvin Morales—now serving a life sentence—was allegedly detained; formally arrested after confessing; indicted; tried; and convicted of that brutal murder on the strength of evidence summarized hereinafter, which proof included various types of confessions, the constitutional admissibility of which is the subject of this review.

Indeed, as petitioner would have it, this case provides a vehicle for resolving a question not yet decided by this Court, *viz.*, whether the exclusionary rule utilized by federal and state courts as a device to deter police abuses of Fourth Amendment rights is available in state courts to suppress confessions made by an accused person following his investigative seizure on less than probable cause [see, *e.g. Terry* v. *Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1879 n. 6 (1968)]. That claim, needless to say, presupposes the illegality of the detention of the petitioner Morales, who also argues both the inapplicability of the doctrine of attenuation to cases like the instant one and also the lack of a basis for applying it herein. Relative to the latter contention, petitioner avers that his confessions were products of a will overborne.

Our view, however, is that petitioner's constitutional rights were in no way abridged and that, even assuming the contrary with respect to his Fourth Amendment contention,

the exclusionary rule should not be automatically applied to situations like the one at Bar. Were this Court to reject only our arguments in support of the latter position, our feeling would still be that a reversal solely on Fourth Amendment grounds of the state court judgment would not be in order, but rather that the case should then be remitted to the jurisdiction of conviction for the purpose of taking further evidence on the subject of the lawfulness of petitioner's detention. More specifically, such an inquiry, as we see it, would turn on (1) the facts precipitating the detention of Melvin Morales, and (2) the facts respecting whether or not the petitioner voluntarily surrendered himself to the authorities, either of which inquiries conceivably could adduce additional proof defeating the claim to the protection of the Fourth Amendment. A short outline of the various proceedings in the state courts will, we believe, demonstrate that respondent possibly is before this tribunal without all the evidence relevant to those questions that might have been available if the Fourth Amendment point had been pressed from the outset of this litigation.

The trial of this case began on May 3, 1965, and, pursuant to the procedure mandated by this Court [*Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964)], the trial judge conducted a hearing outside the presence of the jury on the voluntariness issue—a proceeding known in New York as a *Huntley* hearing [see *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y. Supp. 2d 838, 204 N.E. 2d 179 (1965)]. Of note is the fact that that proceeding took place before the landmark opinion in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966) was handed down, which holding of course is not retroactive in its application [*Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966)].

At the hearing, the petitioner Morales offered testimonial evidence from witnesses other than himself seeking to establish that he had been denied access to family while circumstanced in the so-called "accusatory stage" [see *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964)]. That contention was rejected by the hearing judge.

The defense reiterated the aforesaid claim at the trial, in addition to which Melvin Morales voiced the allegation that his confessions had been involuntarily elicited from him by a combination of police brutality and concomitant throes of withdrawal from narcotics. Beyond that, an alibi defense was also interposed by him and supported by members of his immediate family. Ultimately a jury rejected those assertions on the strength of prosecution evidence, the legal sufficiency of which is, in our judgment, patently unassailable.

Accordingly, the lawfulness of the alleged investigative detention was not an issue litigated at the trial court stage. Yet, in the course of the proceedings at that level, evidence adduced for other purposes demonstrates that, as a result of the labors of a number of New York City detectives—assuming no actual surrender—the detention of petitioner was in all respects lawful. Indeed, it is our view that the incidental proof about which we are speaking is also sufficient to paint a vivid word-picture of the petitioner as a guilt-stricken murderer fearful of Divine retribution who, in expiation for his unspeakable transgression, in a very real sense surrendered himself and thereafter readily confessed his guilt to the authorities.

When this case reached the Appellate Division of the New York Supreme Court, the petitioner simply argued that his confessions should have been excluded because he had not been effectively given *Escobedo*- and *Miranda*-type admonitions, but the retroactivity question was resolved insofar as New York was concerned while the instant case was *sub judice* in the tribunal aforesaid [see *People* v. *McQueen,* 18 N.Y.2d 337, 274 N.Y. Supp.2d 886, 221 N.E.2d 550 (1967)].

The alleged Fourth Amendment issue was raised, *inter alia,* for the first time in the Court of Appeals by newly assigned counsel, who relied heavily upon the United States Court of Appeals for the Fifth Circuit's interpretation of this Court's decision in *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407 (1963) [see *Collins* v. *Beto,* 348 F.2d 823 (5th Cir. 1965)]. Contrariwise, the prosecution argued in its brief that the Fourth Amendment was not herein involved and that, even if that Amendment were applicable, it must be said on the instant record that the "primary taint" stemming from the infringement of constitutional rights was attenuated as a consequence of the fact that the confessions resulted from the free exercise of the petitioner's will [see also, *People* v. *Dentine,* 21 N.Y.2d 700, 287 N.Y. Supp.2d 427, 234 N.E.2d 462 (1967)]. Additionally, on oral argument, the prosecution pointed out that the probable cause issue had not been developed below and that, as a matter of objective fact, the People might have possessed the requisite quantum of evidence. However, no remand to develop relevant evidence was specifically requested by the prosecution at that time because of its view that attenuation was clearly established in the instant record.

Incidentally, at the time this case reached the tribunal to which we have just referred, the law in New York was that a confession obtained during a period of detention that was illegal either because the arrest had not been predicated on probable cause [*People* v. *Everett,* 10 N.Y.2d 500, 506-7, 225 N.Y. Supp.2d 193, 166 N.E.2d 831 (1961); *cf. People* v. *Robinson,* 13 N.Y.2d 296, 246 N.Y. Supp.2d 623, 196 N.E.2d 261 (1963); *People* v. *Rodriguez,* 11 N.Y.2d 279, 229 N.Y. Supp.2d 353, 183 N.E.2d 651 (1962)] or because there had been an unreasonable delay in arraignment [*People* v. *Vargas,* 7 N.Y.2d 555, 565-6, 200 N.Y. Supp.2d 29, 166 N.E.2d 831 (1960); see *People* v. *Carbonaro,* 21 N.Y. 2d 271, 287 N.Y. Supp.2d 385, 234 N.E.2d 433 (1967)] was not inadmissible for either reason alone; but rather the illegality was viewed as a factor bearing upon the voluntariness issue.

In the New York Court of Appeals, there were two concurring opinions [*People* v. *Morales,* 22 N.Y.2d 55, 290 N.Y. Supp.2d 898, 238 N.E.2d 307 (1968), *cert. granted,* 394 U.S. 972, 89 S.Ct. 1472 (1969)] affirming the order appealed from, one of which was written by Chief Judge Fuld who concurred in the result only because the "* * * defendant waived his constitutional rights and acquiesced in his being interrogated by the police at the police station." The quoted remark, we submit, could be understood as meaning that a surrender by Morales may be found on the instant record—a view explicitly rejected by the other members of the court.

The rest of the jurists on New York State's highest court also joined in an opinion by Judge Jasen, wherein it

was stated that the absence of probable cause to arrest Morales "may be conceded"—a concession never made by the prosecution herein. In any event and by employing a balancing of interests approach, those jurists found that, on the facts of this case, the interference with petitioner's right to privacy and to freedom of movement was not unreasonable within the meaning of the Fourth Amendment. Moreover, the opinion narrowly confined the ambit of lawful seizures of the person, both at inception and in scope. Specifically, it limited investigative detention upon "reasonable suspicion" to a reasonable and brief period of time under conditions protecting the suspect's Fifth and Sixth Amendment rights in the case of persons reasonably suspected of possessing knowledge about a crime presenting a high degree of public concern affecting the public safety [see also, *People* v. *Herbison*, 22 N.Y.2d 946, 295 N.Y. Supp.2d 162, 242 N.E.2d 394 (1968)]. Mass detentions for questioning were of course condemned by those members of the court.

Prior to filing his petition for a writ of *certiorari* in this Court, Morales successfully moved in the New York Court of Appeals to amend the remittitur [22 N.Y.2d 753, 292 N.Y. Supp.2d 130, 239 N.E.2d 221 (1968)] so that it would reflect the fact that his Fifth and Sixth Amendment claims were also considered in that forum. For that reason and because we feel that the record in this Court is adequate for the purpose, it seems to us that no barriers presently exist to a consideration of respondent's contention that the taint of illegality stemming from any conceivable infringement of the petitioner's Fourth Amendment rights was dissipated by his freely made decision to confess—one of a number of arguments made hereinafter.

Several days after the *remittitur* was amended, this Court decided the so-called "Stop and Frisk" cases [see

Terry v. *Ohio, supra*; *Sibron* v. *New York and Peters* v. *New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968)].

The petition for the writ of *certiorari* in the instant case, filed August 10, 1968, was opposed by the respondent on both legal and pragmatic grounds. As for the former, argumentation in large part was devoted to efforts seeking to demonstrate that the "Stop and Frisk" precedents were dispositive herein. In connection with the latter ground, respondent pointed out that this Court possibly would deem it necessary to remit this case to the state courts for the taking of additional evidence on the Fourth Amendment question.

B. The Evidence

Events surrounding the violent death of Addie Brown

On the last night of her life, Addie Brown, who was estranged from her husband, gave a party at her home, Apartment 9-B in a 21-story residential building containing over a hundred dwelling units located at 700 East 156th Street, County of Bronx, City and State of New York, after which that fifty-six-year-old woman decided to accompany two of her female guests to the subway (Collins 747-9, 755; Wright 758-9; Durkin 493).* Thus, at approximately 2:20 a.m. on Sunday, October 4, 1964, the three women left the apartment, at which time one of the other ladies observed the now deceased—who wore a wig (Peo.'s Exh. 10, 510,

* Unless otherwise indicated, references are to pages of the printed Record on Appeal to the Supreme Court of the State of New York, Appellate Division, First Department. Page references followed by the suffix "H" indicate testimony elicited at the voluntariness hearing.

1311)—placing her apartment keys into a change purse she had in her hand (Collins 753, *cf.* 763; Wright 761-2). At about 2:45 a.m. in the subway station, Addie Brown waved good-by to her friends (Collins 750; Wright 757).

Sometime between 3:00 a.m. and 3:30 a.m., two men in an eleventh floor apartment of premises 700 East 156th Street heard a female screaming, after which they ran into the hallway (Wales 288-90; Carr 318-9). One of them, Correction Officer Lionel Wales, looked into both elevator shafts but saw no cars, after which he ran up to the twelfth floor and looked down one of the two elevator shafts (Wales 290). Whereupon, he started back to the eleventh floor (*ibid.*). While on the stairs between floors, Wales heard someone running down the stairs, which sounds he believed were made by a male and came from two or three floors below, and which sounds continued until the witness heard a "door" (*id.* 296, 305-10).

At the start of Wales' peregrinations, one Dudley Ivan Carr, exited from the former's apartment and started walking towards one of the elevators with him, at which time Carr heard rapid footsteps which sounded like they came from the stairwell and from "above me" (Carr 319, 321-2). When Wales went upstairs, Carr pressed the elevator button, causing the car to descend to the eleventh floor (*id.* 320).

A woman was standing in the car, and the observer noted that she was bleeding from the face and that she had a wig in her hand (*ibid.*). Then, Carr and Wales, who had returned, helped the woman out of the elevator, after which they sat the lady down and tied a towel around her

back to stop the bleeding from that part of her body (Wales 293; Carr 321; Peo.'s Exhs. 1 through 7; 287, 298, 1294, 1307).

The victim was alive at this point, but she did not respond when Wales asked who her assailant had been (Wales 295-8). Similarly, while still alive, the woman in question did not answer inquiries by one of the first police officers to arrive at the scene (Covello 349-50). An ambulance attendant arrived at about 3:20 a.m., and death was pronounced at approximately 3:30 a.m. (*id.* 352-3).

The body of the victim—later identified by her estranged husband as Addie Brown—had 31 stab wounds on its surface: some of which penetrated into the chest cavity and/or into the lungs causing massive hemorrhage, while another severed the right external jugular vein (Edberg 253-4, 261; Browne 335-6). The wounds aforesaid and the hemorrhage caused death (Edberg 253-4, 261).

Investigation of the murder and circumstances leading up to the alleged investigative detention of Melvin Morales

Detectives at the scene learned the identity of the deceased by trying to open various apartment doors with a set of keys that had been found in the elevator, which process finally led them to the victim's home, Apartment 9-B (Durkin 492-3, 545). In the course of these labors, they asked some residents of the building to view the corpse and questioned most of the tenants, estimated to have been a hundred or more in number (*id.* 493). Thus, investigatory efforts within the premises were directed from the eleventh floor, where the witnesses Carr and Wales were with Detective Durkin "for sometime" (*id.* 515).

At a point in time not fixed by the record other than its having preceded the ultimately successful police efforts to identify the dead woman, Detective Anibal Texeira was instructed in connection with those endeavors to leave the building and to check out a reported fight between a man and a woman earlier that evening at a Ralph's Bar and Grill (Texeira 1063). Learning from a bartender that a man called "Shorty" had been involved in the fracas, Texeira brought a person known by that sobriquet to the station house (*ibid.*). There, the police officer ascertained that "Shorty" had fought with a girl-friend and slapped her, after which the disputants went home (*ibid.*).

At about 3:30 or 4:00 a.m. on the day and in the premises in question, Augusto ("Snooky") Morales, a brother of the petitioner, was waiting for the elevator on the thirteenth floor after leaving a friend's apartment when some detectives arrived, frisked him and searched him (A. Morales 153-4H). Thereafter, at a time not precisely pinpointed in Augusto's testimony, he was taken to the eleventh floor; asked if he could identify a dead woman sprawled thereon; and otherwise interrogated (*id.* 155H). Augusto Morales then claimed to have been, during the critical time, in a bar and later at the home of a friend—seemingly the tenant of the thirteenth floor apartment (Durkin 67-70H).

Detectives Texeira and Melvin Black later went to the Morales' home—Apartment 3-B—and their arrival at that suite about 5:00 or 5:30 a.m. coincided with that of one Leon Morales, a musician and another brother of the petitioner, whom Detective Texeira interrogated in the hallway

(Texeira 1058; Black 1065-6). The apartment door was opened by the petitioner's mother, Rebecca Morales, who gave Black permission to enter the apartment, and who, upon being asked, responded that her son Augusto and his wife were with her in that suite (Black 1066). Asked if anyone else lived with her, Mrs. Morales replied that another son named Leon did, adding that Leon was not home at that time (*ibid.*). Rebecca Morales summoned her son Augusto at the request of Black, which officer asked that man about "where he had been" and if he would get dressed in "the same clothes he had on at that time" and accompany him upstairs (*ibid.*). Augusto Morales was "interviewed" on the eleventh floor by a Sergeant Pepe (Texeira 1058; Black 1067). It is not clear in the record whether this visit to the eleventh floor was the one Augusto Morales described in his testimony or whether there were two such occurrences.

At approximately 6:30 or 7:00 a.m., Texeira and Black again went to the Morales' apartment, after which Leon, his brother Augusto, the latter brother's wife, Yvonne, and Mrs. Rebecca Morales went to police headquarters. The record, while indicating rather clearly that Augusto Morales was the person with whose activities the authorities were concerned, is somewhat equivocal on the subject of how so many members of the family happened to go to the station house.[1]

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1. The visits by Texeira and Black to the Morales' apartment, incidentally, had an added significance at the trial in connection with the alibi proffered by the petitioner; to wit, that from the evening of October 3rd until just before his relatives left for the police station the following morning, he had been continuously present in his mother's apartment, sitting and sleeping at the dining room table (M. Morales 886-7). He added in that connection that he had left

Thus, the officers in question testified that they had requested the individuals under discussion to accompany them to the pertinent location (Texeira 1058; Black 1067). But, Mrs. Rebecca Morales testified both that the policemen asked the family members to go with them and that she succeeded in obtaining permission from the officers for the others to accompany Augusto (R. Morales 147H). Additionally, she averred that Augusto never returned after being taken from their apartment (*id.*), and that she had not even seen him being taken to headquarters (*id.* 801). According to Leon Morales, the police informed only "Snooky" that he had to go with them, after which the mother of the Morales brothers said she was upset and that she "* * * would like us all to go down to make sure he was not railroaded. She didn't use those exact terms" (L. Morales 880). On the same subject, Yvonne Morales, wife of Augusto, testified that her brother-in-law Leon had driven her and her mother-in-law to the station house in his automobile (Y. Morales 859).

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the apartment before the others and was stopped by a police officer, who asked Morales some questions, searched him, and permitted the petitioner to proceed (*id.* 887-8). The assertions by the petitioner described earlier in this paragraph were verified by his mother, who also claimed that no police officer had entered her apartment far enough to be able to see the petitioner at the dining room table (R. Morales 791-802, 807, 839, 846). Leon Morales confirmed the relevant averments of both the petitioner and their mother (L. Morales 876-81). Yvonne Morales further bolstered those allegations, except that she admitted not seeing the petitioner between 11:30 p.m. on October 3rd and 6:00 a.m. the following morning, during which time she was apparently sleeping (Y. Morales 853-9, 1136). On the other hand, prosecution evidence established that Detective Black had actually entered the apartment both times and looked in some rooms—including the dining room on at least one occasion—without seeing the petitioner; but during the latter visit, the bathroom was occupied by Yvonne Morales according to what her mother-in-law told the officer in question (Texeira 1057-9, 1064; Black 1065-85).

Augusto Morales remained at the precinct until about 2:00 p.m. on the afternoon of Sunday, October 4th—the earliest feasible time that his story about having been in a bar could be verified because of Sabbath laws forbidding licensed premises from opening before the afternoon (Durkin 67-70H; A. Morales 156-7H; R. Morales 147H). Under circumstances not described in the record, a second visit to the police station on October 5th was made by Augusto—a man who looked like his brother Melvin in the opinion of "everyone" (R. Morales 143-4H; A. Morales 156-7H, 160H). According to one detective, Augusto Morales mentioned having a brother named Melvin sometime on the morning of October 4th (Durkin 524). Melvin Morales, as our narrative will soon indicate, was known as a convicted narcotics offender to certain detectives working on this investigation.

From October 4th on, numerous detective squads investigated the Addie Brown murder, including those led by Louis Golly of the Homicide Squad and Thomas Durkin of the 42nd Squad, which latter officer was the man ultimately credited for the arrest under police department procedures (Daum 445, 453; Durkin 488; Golly 585; Ferguson 740). Many persons were questioned during the investigation which culminated on October 13, 1964, such as two women guests at the deceased's last party who were interviewed on or about October 5th at police headquarters and who later became prosecution witnesses (Carroll 362; Durkin 568, 668-9; Golly 586; Ferguson 745). During investigatory efforts, detectives from the various squads working on the case exchanged information, such as a piece of intelligence to the effect that Melvin Morales was no longer to be found in his usual haunts (Durkin 524-5; Ferguson 740, 745; see Carroll 394-5).

On October 5, 1964, Detective Aubrey Ferguson, who was working on this case and who had known the petitioner since 1950, met the latter's mother outside premises 700 East 156th Street (Ferguson 730). That police officer, who did not know the petitioner's brothers, asked the woman where her son was, to which question she replied that "* * * she doesn't know, she hasn't seen him for quite sometime, he doesn't live with her" (*id.* 731). As for that incident, Mrs. Rebecca Moraels explained at trial that her pertinent utterance had pertained to one of her sons other than the petitioner (R. Morales 848-9).

Detective Ferguson also testified that he had taken part in the questioning of several narcotics users in the vicinity of the crime scene about a week after the untoward incident, as is illustrated by the following colloquy:

> "Q. Did you do anything further after October 4, in trying to ascertain the whereabouts of this defendant? A. I did.
>
> Q. Well, when was that? A. It was after the week-end; it must have been. He was—the 13th—the week-end of the eleventh or twelfth. We rounded up several narcotic users; we call them junkies, in the vicinity. And we had conversations with them. And from them we learned that Moral—
>
> Q. Don't tell us what you learned from the junkies. Just tell us what you did. Now you have told us—
>
> A. As a result of our conversations with these junkies, we then concentrated our efforts in an effort to locate Morales." (Ferguson 732-3).

Within the week, investigation also led the police to a "young boy," Everett Roberts, who later testified at the trial that he had seen the petitioner sitting on a bench out-

side the premises wherein the murder occurred at about 3:20 a.m. on the critical morning (Roberts 697-714).

On cross-examination by defense counsel, this witness explained that, at the pertinent time, he had just walked his friend, Charles Green, to the latter's home—the building in which the murder occurred—and was returning to his own abode, wherein the witness, his friend, and their "group" had been practicing musical arrangements earlier that evening (*id.* 699-703).

Green told the witness Roberts about the murder later that day, Sunday, October 4, 1964 (*id.* 712). On the following Saturday, three or four detectives came to Roberts' home, and that witness also talked to one of those officers during the following week (*id.* 704-5, 713). During interrogation by those policemen, the witness Roberts told about having seen the man sitting on the bench and he described that person in the same manner as he did later at the trial—in which court proceeding he positively identified the petitioner Melvin Morales as the individual he had observed near the scene of the crime at the pertinent time (*id.* 698; 705-6; 713-4). On a particular Wednesday morning—not otherwise pinpointed in the record—Roberts identified the petitioner at police headquarters (*id.* 707-8).[2]

Additionally during the investigation, Detectives Daum and Leslie Carroll interviewed Mrs. Rebecca Morales at

2. Apparently because of the witness Roberts' inability, during cross-examination, to fix with certainty the month in which he had made the critical observation (Roberts 703), the prosecutor stated on summation that he did not put "much stock in the little boy" (1192). However, the attorney for the state went on to tell the jury, in essence, that the issue of credibility was one for their resolution (*ibid.*).

her home on October 12th and 13th, and the latter officer acknowledged that he might have made an earlier visit on the 10th (Carroll 409-17; Daum 444-8, 455-9). On October 12th, Rebecca Morales was informed that the police wished to interrogate her son Melvin about the Addie Brown homicide, and she told them that the petitioner had been in her apartment at the critical time (*ibid.*).

On the subject of these visits, Mrs. Rebecca Morales testified on direct examination that, on Saturday, October 10, 1964, at about 11:00 p.m., Detectives Carroll and Daum visited her home (R. Morales 111-3H). In ensuing conversation, the petitioner's mother was told that the police wished to interrogate Melvin Morales, but they did not cite the reason (*id.* 114-5H). Mrs. Morales informed the visitors that Melvin came to her home and to her beauty parlor "all the time," and that he might come to her apartment that night (*ibid.*).

On Monday, October 12th, the same two policemen again visited Mrs. Morales about midday (*id.* 116H). At that time, the female witness informed the officers that her son Melvin had phoned and asked her what time she would be home, and that she had told him about 6:00 or 7:00 p.m. (*id.* 117H). Whereupon, one detective asked the witness to get in touch with the police if Melvin called, after which Mrs. Morales averred that her son Melvin was not running away or hiding, that it was no problem to find him, and that she would give them the telephone number to her shop (*ibid.*).

The witness, during further colloquy about why the police wished to question Melvin, remarked, "For what, to do the same thing that you did to my other son Snooky,

take him down for questioning for something?" (*id.* 118H). One of the officers answered affirmatively, adding, in substance, that they would let the petitioner go after interrogation (*ibid.*). Whereupon, the witness asked, in essence, if she could be present at the interrogation, in response to which inquiry she was informed "* * * it isn't necessary * * *" (*ibid.*).

On Tuesday, October 13, 1964, Mrs. Morales received a telephone call from the petitioner, during which conversation she informed her son that Mr. Carroll wanted to talk to him (*id.* 119H). Thereupon, the petitioner said, " 'All right, Mother, I will come up to see them.' " Mrs. Morales then said, " 'O.K. Come up to the beauty parlor,' " and her son replied, " 'All right, I will be up there' " (*ibid.*).

In that vein, the petitioner acknowledged himself from the witness stand that, prior to his arrest, his mother had informed him over the telephone that Carroll wished to speak to him, but he was uncertain as to the exact date of that conversation which he believed might have been on Sunday, October 11th (M. Morales 904).

On cross-examination, Rebecca Morales admitted having told the petitioner on October 4th in her apartment that the police wished to interrogate his brother about the murder by stabbing that had occurred earlier that morning in her residence building, and she averred that, between that day and October 13th, she had seen petitioner in her home on Wednesday, Thursday, and Friday and in her shop on Saturday (R. Morales, 144-52H).

Events of October 13th following her telephone conversation with the petitioner were also detailed in the

direct examination of the witness in question (*id.* 120-6H, 132-3H, 812-9).

While in her business establishment about 4:00 p.m. that afternoon, Mrs. Morales received a telephone call from Detective Carroll, during which the former assured the caller that the petitioner would come to her shop that evening (*id.* 120H). Later on about 8:00 p.m., Detective Daum entered the shop, told Mrs. Morales that her son Melvin had arrived in a taxicab and asked if she wished to pay the $1.10 fare owing to the taxidriver (*id.* 121-2H). While still inside the store, Mrs. Morales expressed a desire to speak to the petitioner, but Daum informed her that it was not necessary because they were "* * * only going to take him down for questioning and keep him maybe an hour" (*id.* 123H).

On the street thereafter, Daum again refused to let the woman in question speak to the petitioner, who was then seated in an automobile with Detective Carroll (*id.* 125-6H). As Daum approached that vehicle, he again told Mrs. Morales that she could not speak to her son, touching the witness firmly but not roughly at that time (*id.* 126, 132-3H).

Turning to the prosecution evidence respecting the "seizure" of Melvin Morales, the record shows that Detectives Carroll and Daum, after leaving Mrs. Morales' home on October 13th, saw her enter a taxicab and followed behind that vehicle, thereafter losing the taxi but ultimately arriving at the beauty parlor about 1:30 p.m. (Carroll 363-4; Daum 445-6). The officers stayed in the area, and later that afternoon Carroll telephoned Mrs. Morales (Car-

roll 364). When the petitioner arrived at about 8:00 p.m., Carroll placed him in the other detective's privately-owned automobile, while Daum went and had a conversation with Mrs. Morales about the cab fare owed by her son, after which they both exited from the shop (Carroll 374-6; Daum 446-8). At that time, petitioner was not free to go (Daum 463). While he did not specifically remember such an occurrence, Daum acknowledged that Mrs. Morales could have asked him to speak to her son (*id.* 461). Before driving off with the petitioner, Detective Carroll promised to phone the former's mother (Carroll 388).

Prior to the alleged seizure of the petitioner, Detective Carroll, who knew Melvin Morales, suspected the latter of being a narcotics user because of conversations with petitioner's father four or five years before the time herein critical (*id.* 86-7H)—as contrasted with other members of the police department investigating this case who knew that the petitioner had a record of narcotics convictions or that he was a user (Golly 617; Ferguson 732). He added that the petitioner Morales had been picked up for questioning because investigation revealed that "* * * Morales had been a constant and habitual frequenter of the area and could have been seen at almost any time of the day or night in the area, and that shortly after this thing occurred, that he had absented himself therefrom" (Carroll 394-5; Durkin 524-5).

When pressed about the state of his personal knowledge at the time he took the petitioner into custody, Carroll made the following responses:

"Q. You said that you knew two days before [i.e., the 11th] that you wanted to question the defendant Melvin Morales, isn't that so? A. Yes, sir.

Q. Is there any question about that, sir? A. No, sir.

Q. All right. Was he a suspect in connection with the homicide that occurred on October 4th?

Mr. McCarthy: Well, again, the same objection. That's a highly technical work, in view of the recent decisions of the Court. I think we ought to have a clarification of it.

Mr. Muschio: On the contrary—

The Court: Explain to him what you mean by the word 'suspect.'

Q. Do you know what I mean by the word 'suspect'?

The Court: If I were a cop on a homicide investigation, everybody is a suspect. I'd rule out nobody. Everybody is a suspect, in my mind.

Now, is that what you mean?

Q. Did you have any reason in your mind at the time to believe that this defendant was connected either directly or indirectly with that homicide which occurred October 4, 1964? Yes or no? A. That's what I wanted to question him about. I concur with the Judge. Everybody is a suspect.

Q. All right. Now, did you have any idea in your mind, sir, that this defendant was possibly connected in one way or other with that homicide? Yes or no? A. Not particularly" (Carroll 84).

At another point in his testimony, Detective Carroll acknowledged that, at the time Morales was apprehended, he (*i.e.*, Carroll) "* * * didn't have anything against him that would definitely pin him to the homicide," and he was dubious about the petitioner being the killer of Addie Brown (*id.* 404-5).

The petitioner's confessions and incidents subsequent thereto

En route to headquarters in the automobile, there was no discussion of the instant homicide (Carroll 417; Daum 462). At the precinct upon arrival about 8:30 p.m., Melvin Morales was taken into an office, after which Carroll went out to get coffee and cake (Carroll 366; Daum 448-9). Daum was the first detective in the precinct to speak about this case with the petitioner (Daum 477), and that incident was described by the former in the following colloquy:

"Q. Did you have any conversation with him pertaining to the incidents of this case? A. Yes, I did.

Q. Tell us what you said to this defendant and what he said to you? A. I informed the defendant Melvin Morales that my name was Detective Donald Daum, and that I was from the Bronx Homicide Squad, and that I was going to ask him some questions pertaining to the lady that had been killed at 700 East 156th Street on October the 4th, and I further stated to him that he need not answer the questions or that any time he wished to have a lawyer, he may have one, and that any answers he did give to me could be held against him, and I could

testify to it in court, and the defendant Melvin Morales stated to me, 'If it's all the same to you, Detective Daum, I would rather talk to Detective Carroll, because I know Detective Carroll, and that was the end of the conversation'' (*id.* 449).

About five minutes after his arrival at the station house and while Daum was standing outside the room, Melvin Morales talked to Detective Aubrey Ferguson—who knew petitioner since he was a "little boy" and who was aware of his criminal record—and, in response to that officer's inquiry, the petitioner denied that he had done "it" (Ferguson 721-2, 731-4, 1113). Morales went on to describe his actions at the critical time, which account included an assertion that he had been in the bathroom of his mother's apartment when the police arrived (*id.* 722, 737). After at most ten minutes of conversation, Ferguson left for the Morales' home hoping to find loopholes in petitioner's story and to ask Mrs. Morales why she had told him that she never saw the petitioner (*id.* 737-8, 1114).

Detective Carroll returned, spoke with Daum, and then to Morales with no one else present, which discussion commenced about 8:45 p.m. and took place while the principals were having coffee and cake (Carroll 366, 385-6; Daum 450).

Their interlocution, which lasted until about 9:00 p.m., was elicited at trial:

"Q. What did he say to you and then what did you say to him? A. Well, the defendant said to me, he said 'You know, Carroll, I can't take a beating.

Q. What did you say? A. I said to him 'Nobody will lay a hand on you' I said 'Stop making alibis.' I said 'You're building crutches to lean upon and fences to hide behind' and I said to him 'There is only one thing you can't do, you can't lie to yourself.' And I said to him 'You can't lie to God' and I said to him 'Do you believe in God,' and he said 'Yes, I do.' Then I said to him 'Well, between you and your God, did you do this thing?' And he said 'Yes, I did' and I said to him 'Well, how would you feel to have somebody do that to your mother?' and he said 'Oh, God, no' and then I said to him 'Well, I am not here to judge you,' I said 'You know you are entitled to a lawyer, you don't have to tell me anything and anything you do tell me may later be used against you.' But you were there and I was not. Do you want to tell me exactly what happened?' and he said 'Yes' and then he recounted what had happened.

Q. Tell us what he said. A. Well he told me that on October 4th, early in the morning he was sitting on a bench in front of his mother's house. I asked him what time it was and he said he didn't remember the time. He said he was sitting on the bench and that he needed a fix. He said he was sick and that he saw this woman come along and she started into the building, and he said he followed her into the building and that she entered the elevator and he entered the elevator.

He said that she pushed the button, and that the elevator statrted up. He says he doesn't know what floor; he didn't know what floor she had pushed. That he said he grabbed her pocketbook. He said that she started to fight with him; and that he had a knife fixed to his arm,

to his right arm by a rubber band; and that he made a motion with his hand whereby the knife came down into his grasp; and that he started to stab her.

And he said she kept hollering, and she said, 'Oh God. Stop it.' And he said she kept hollering, and he kept stabbing her.

He said that he got the pocketbook, the elevator stopped, and that he ran out of the elevator, and he ran down a stairwell, and he skipped stairs while running; that he ran out onto Jackson Avenue, underneath the el; and that he ran down to about 149th Street.

He said that later he went to Brook Avenue, and he copped two three-dollar bags; that he took a shot.

He said that later he returned home. He said that he had thrown the knife in a sewer, and he had discarded the bag in a basket, a Department of Sanitation basket'' (Carroll 366-82; 178-82H).

Thereupon, Carroll called Detective Daum into the room, and then Morales was told by Daum that he would be asked to repeat his story several times by different persons, after which Carroll suggested that the petitioner write out his own statement (Peo.'s Exhs. 8 and 8a; 370-1, 1308-10) so that no one could change it—a suggestion with which the petitioner complied beginning at 9:05 p.m. (Carroll 212-25H, 368-9; Daum 451-2). The contents of the handwritten confession by Morales were substantially identical with the statements attributed to him by Carroll: it was witnessed by the two detectives and signed by the petitioner

after which he wrote, "This is true between me and God" (*ibid.*).

After the handwritten statement had been completed and while the petitioner and the detectives were having more coffee, Carroll made a comment to Morales about the number of times the deceased had been stabbed, which prompted the petitioner to remark, " 'She wouldn't stop hollering' " (Carroll 372; Daum 452). Whereupon, Morales pantomimed the fatal attack, showing how the victim kept turning and remarking that "* * * when she kept turning he stabbed her everywhere she turned" (*ibid.*).

Asked for any other conversation with Morales at that time, Carroll responded as follows:

> "I started [*sic*] to him that he said he had been up in the house, in his mother's house. And he said he was. He had been looking at T.V. And he said that his mother, and I believe his sister-in-law, had been present and that they had gone to bed. And that after the mother had gone to bed and had fallen asleep, that it was at that time that he had left the apartment, and that he had fixed the door so that he could get back in. And that he had gone downstairs and had sat on the bench" (Carroll 372-3; Daum 452-3).

Also significant on this score is the testimony of a defense witness that it was possible to adjust the lock on the door to the Morales' apartment so that it could be opened from the outside without a key (Y. Morales 864-6).

Meanwhile, Detective Ferguson had phoned headquarters from the Morales' apartment, learned of the confession to Detective Carroll, and returned to the precinct

(Ferguson 723, 743). Ferguson then had a second conversation with the petitioner who now admitted his guilt of the relevant crime and gave details, after which Ferguson left the station house before the arrival of Detective Durkin and before 11:00 p.m. (*id.* 723-5, 742, 1113-4). Incidentally, a defense witness testified in rebuttal that Ferguson had been in the Morales' apartment until nearly 11:00 p.m. (Hinds 1138-9).

After the discourse with Detective Carroll aforesaid, Durkin and Golly heard the petitioner confess in detail to the crime he had committed, and they testified at trial to that fact. However, the record indicates that these witnesses were talking basically about the same occurrences, and, indeed Golly placed Durkin in the pertinent room at times when significant admissions were uttered (Golly 589-93).

Furthermore, both detectives agreed that the questioning was intermittent and that the time period under discussion ran from about 11:00 or 11:15 p.m. until 12:15 or 12:30 a.m. (Durkin 530, 551-2; Golly 628-9). Similarly, both recalled that, before Morales confessed in their presence, he (*i.e.*, the petitioner) acknowledged having been apprised of his rights and stated that he did not want the assistance of an attorney (Durkin 497-8; Golly 589, 652-6). As Golly recalled the incident, Morales told his story at the request of Carroll; but both detectives Durkin and Golly thereafter asked questions of Morales (Golly 589).

Also, both of the witnesses being discussed voiced substantially identical versions of what Morales had said (Durkin 498-500; Golly 589-91). According to the witness

Durkin, the petitioner Melvin Morales had completed a full confession within twenty minutes to one-half hour after the two of them began to converse that night and later Durkin again "went over" the oral statement with Morales (Durkin 551-2). Thereafter, Durkin went out and later returned with hamburgers and coffee, after which he talked apparently about other matters with Morales until the arrival of an assistant district attorney (*ibid.*). Golly also had a recollection of the fact that Morales was eating at the pertinent time (Golly 589).

During the episode just described, the petitioner gave some additional particulars about his activities not previously mentioned by him.

For one thing, he asserted that the homicidal act had netted him some eight or nine dollars from the victim's purse (Durkin 497-500; Golly 591). Additionally, Durkin recalled Morales saying that the lethal weapon had a black handle; while Golly recalled the petitioner's describing it as a lock-knife with a five-inch blade (Durkin 522; Golly 595-7). Incidentally in that connection, the record contains descriptions of unsuccessful police efforts to recover that implement, both by having people from another agency search the sewer referred to and later pointed out by Morales, and by executing a search warrant at the home of petitioner's mother (Durkin 506-9, 521-3, 557-61; Golly 600-4, 633).

Also, the petitioner Melvin Morales said that he had disposed of the shoes he had worn during the untoward incident, after which he purchased others at a particular store, and that, two days after the attack, he put the suit

he had worn during the fatal assault into a certain cleaning establishment (Durkin 499-500, 507, 557-61; Golly 595-7, 632-3, 637). Subsequent efforts failed to locate the shoes or verify the purchase of a new pair; however, a suit (People's Exh. 13; 718, 1311) free of bloodstains was surrendered by a female employee of a dry-cleaning shop to a police officer upon presentation of a receipt which had been found in the petitioner's wallet, and, when asked, that lady informed the officer that she had not seen blood stains on the suit before it had been dry-cleaned (Durkin 499-500, 507, 577-61, 504-6; Golly 595-7, 632-3, 637; Lenahan 714-20; M. Morales 927).

On the subject of his wearing apparel, Morales at trial admitted having discarded a pair of shoes and having had his only suit dry-cleaned on October 5th, but he explained that the shoes had been beyond repair and that the suit had needed a cleaning (M. Morales 894-6).

Assistant District Attorney Seymour Rotker arrived at the precinct somewhere between 12:35 and 12:45 a.m., on October 14th with a stenographer named Irwin Wasserman in order to interrogate the petitioner in accordance with the practice followed by the Bronx District Attorney's Office in felony cases (Rotker 671-81). Mr. Rotker had a conference with Detective Durkin, was shown a handwritten confession by Morales, and spoke to the petitioner about this case prior to the formal interrogation which was stenographically recorded (Durkin 553; Rotker 682-3). The colloquy copied down by the stenographer commenced at 1:00 a.m., and it lasted at least ten minutes and no more than thirty minutes according to the estimates given by the witnesses (Durkin 555; Golly 599; Rotker 685, 695).

Present at that time were Messrs. Durkin, Golly, Rotker and Wasserman, but only the assistant district attorney and the petitioner spoke in that interval (Wasserman 1122-4; Rotker 1126-7). At the outset of that interrogation, the petitioner gave affirmative answers when asked if he knew that his statement could be used against him and if he had previously been advised of his rights by police officers, and, also, he stated that the officers had given him a hamburger and tea with milk (Rotker 674). The questioning period under discussion resulted in a full confession by Melvin Morales (*id.* 673-7).

According to Mr. Rotker, he used no force or duress to elicit the inculpatory utterances from the petitioner; he saw nothing unusual about Morales' hands or face; and the petitioner Morales did not complain of police brutality to him (*id.* 101-2H, 689). In that regard, it may be noted at this juncture that various police officers testified that the petitioner had been given food and drink and that no force or duress had been employed to elicit confessions from Morales (Golly 33-4H; Daum 43-4H, 486, 1043-6; Durkin 60-1H; Carroll 78-9H, 431; Pepe 1104-6; see Smith 93-6H, 1117-9). Assistant District Attorney Rotker averred further that the petitioner had not been sick when he questioned him; that he had been unaware—apparently until the day he testified at the voluntariness hearing—that Morales had been taken to the hospital sometime after that interrogation; and that he did not know the reason for that hospital visit (Rotker 107-8H).

At about 1:30 a.m. on October 14th, the petitioner Morales was taken to the scene, where he reenacted the crime (Durkin 503-4; Golly 587, 599-600).

At police headquarters about 3:35 a.m., a patrolman was assigned alone to take the petitioner to Morrisania Hospital and back to the precinct (Wilkie 1049-55). At the hospital at about 4:00 a.m. on October 14th, a doctor diagnosed the petitioner Morales' condition as withdrawal effect, "which means some signs of drug addiction;" injected Morales with a calming agent, and did not treat the petitioner for any other ailment (Solomon 1086-90).

Prior to his arraignment later that day, nude photographs of the petitioner were taken by the police (Durkin 664; M. Morales 970; Peo.'s Exhs. 15 through 19; 970, 1314-22).

A Correction Officer assigned to the Criminal Court of the City of New York, County of Bronx, who interviewed Morales after his arraignment testified that, according to his records, the petitioner had stated that he was sick from drugs when the witness asked him about his physical condition (Smith 93-100H, 1117-9).

On October 20, 1964 Detectives Durkin and Carroll went to see the petitioner in the Bronx County Jail with a view towards finding out if Morales had made a mistake about where he had thrown the murder weapon (Durkin 655, 659). Morales, who had been assigned counsel at the arraignment, told those officers that he had been advised not to speak to them, after which Morales then said, " 'I am going to fight this thing' " (*id.* 655-62).

The balance of petitioner's version of relevant events

The petitioner Melvin Morales, who had not testified at the voluntariness hearing, took the stand on his own behalf at trial and testified that he was thirty years of age; that he had been a narcotics addict for thirteen years and supported his habit by shoplifting or "hustling" when not working; and that he had numerous previous convictions for policy and possession of narcotics (M. Morales 883-4, 896-8).

While in the automobile en route to the station house after the petitioner's arrest, Detective Daum hit Morales —"a slight-of-hand"—and called him a "son-of-a-bitch" (*id.* 914-5).

In the precinct house, a man called "Lieutenant" by the other officers informed the petitioner that " '* * * all we want you to do is sign this paper * * *' " (*id.* 916-7). After the petitioner had voiced a refusal to comply, Daum threatened him and cursed at him (*id.* 917). Whereupon, Morales rose, raised his hand, and said, " 'You have to kill me first,' " which prompted the "Lieutenant" to comment, " 'We'll do that, too' " (*ibid.*).

Respecting that incident, it may be observed now that the lieutenant commanding the 42nd Squad at the time critical herein testified that he was off duty and not in the precinct during the interrogation of Morales, and that his next-in-command, a sergeant, testified that he did not refer to himself as a "Lieutenant;" that he did not remember anyone calling him by that title on the critical night;

and that he had not said to Morales that " ' we may kill you' " (Norton 1099-1101; Pepe 1104-6).

Returning to petitioner's narrative, he averred further that, after the threat to kill him already described, Carroll and Ferguson spoke to him, and, during that conversation, Ferguson stated that nothing would happen to the petitioner who was insisting that he was innocent (M. Morales 917-8). Apparently around that time, Morales made some sort of statement, a copy of which was viewed as unsatisfactory and torn up by the "Lieutenant" (*id.* 918). Next, Daum kicked the petitioner on the thigh, and Carroll suggested that he would provide Morales with narcotics, after which the petitioner was left alone in the room for a while (*id.* 919-20).

Subsequently, Daum reentered and asked Morales, who was beginning to have withdrawal symptoms, if he was ready to sign, after which that officer hit the petitioner on the back a number of times with a blackjack and threatened him further (*id.* 920). Then a Negro detective—called something like the "non-bruise kid" by an associate—entered the room, ripped the petitioner's shirt apparently in an effort to be sure the petitioner had not been scratched, and then left (*ibid.*). Also, an officer who appeared to be Spanish came in and, after Morales had told him that he refused to sign anything, that person said, " 'Well, I can make you talk. * * * I will give you some truth serum up your nuts and kick your nuts' "—a threat which made the petitioner fear that he would be disfigured (*id.* 921).

Soon thereafter, Carroll and Daum unsuccessfully attempted to persuade the petitioner to sign a statement by

promising him that they would plead him to temporary insanity; that all he would get would be one year; and that it would not be on his record (*id.* 921-2). That recalcitrance led to Daum's again striking Morales with the blackjack (*ibid.*).

Further discussion ensued and further assurances that he need not worry were given to Morales, who was then suffering from cramps and whose thoughts were confined to the blackjack assaults and the threat to kick him in the private parts (*id.* 922). About that time, Ferguson came in with a piece of paper and told the petitioner they would tell him what to write and how to spell the words (*id.* 922-3). Then, Morales wrote out a statement, writing what he was told to by Carroll, who helped him with the spelling (*id.* 923). When the petitioner had finished "* * * everybody came and started jumping around and congratulating each other" (*ibid.*). Morales was of the opinion that he had signed the confession two or three hours after entering the precinct (*id.* 925).

Additionally, the petitioner asserted, in substance, that, during his interrogation by the assistant district attorney, he responded as directed by somebody, but he was uncertain as to whether those directions were issued before or during the pertinent interrogation (*id.* 940-3, 1005-16). Later he was taken to the scene, where the officers conjectured about the manner in which the crime had been committed (*id.* 943-6).

Thereafter, the petitioner was taken back to the precinct, and, still later, he was taken by four patrolmen to a hospital where he was given an injection (*id.* 946-7).

Later that day, the petitioner Morales was taken downtown to the police photography laboratory, at which location photographs of him in the nude were taken (*id.* 948).

Several days later, according to Melvin Morales, Detectives Carroll and Durkin visited him at Bronx County Jail, and, although prison authorities had informed him that he did not have to see them, the petitioner decided to do so hoping that they might have found the true culprit (*id.* 949). The officers asked him about a knife and some shoes, after which they claimed to have found the shoes discarded by Morales on 174th Street, which allegation prompted the petitioner to brand the speaker as a liar (*id.* 950-1).

Finally, Melvin Morales swore that he had not killed Addie Brown (*id.* 952-3).

Among other matters, it was brought out on cross-examination that Morales had graduated from Junior High School and had gone to trade school in New York City (*id.* 954-8). The petitioner also acknowledged that nude photographs of his person (Peo.'s Exhs 15 through 19; 970, 1314-22) had been taken on October 14th by the police, and he further agreed when shown one of them (Peo.'s Exh. 19) that no bruises or marks appeared on his body (M. Morales 964, 970; *cf.* 1029, 1031-3). Moreover, Morales acknowledged that he had not complained about police brutality to a number of people he had encountered on October 14th, including the assistant district attorney, people at the hospital, correction officers, the arraignment judge, and the doctor at Bronx County Jail (*id.* 976-81). The petitioner explained that he had been afraid to tell the assistant district

attorney and that the police officers would not let him tell anyone at the hospital (*id.* 976-9). However, he did complain to the court-assigned lawyer who represented him at the arraignment, but the conversation was not completed due to the petitioner's illness (*id.* 979).

On redirect examination, Morales averred, in essence, that there had been funds available in his mother's house at the critical time so that he had not needed to kill for narcotics money (*id.* 1034-6).

C. Decision by the Hearing Court

The trial judge, sitting as a hearing court, found that the voluntariness of the admissions and confessions had been established beyond a reasonable doubt, and he also remarked that the petitioner had not requested counsel and that, in essence, the refusal of the police to permit Mrs. Morales to converse with her son at the relevant time had not been violative of petitioner's constitutional rights (238-44).

Summary of Argument

Petitioner's felony-murder conviction rests primarily upon the proof of his confessions, the voluntariness of which is so clear that argumentation pitched on prevailing standards of due process would avail him nothing. Moreover, his efforts to expand those standards in an unprecedented fashion that would have far reaching effects in our nation must be rejected. Primarily, petitioner Morales seeks to invoke a *per se* exclusionary device, such as that utilized in the case of "tainted" physical evidence obtained dur-

ing an unlawful seizure of a person; but the fact is that the proof herein is sufficient to establish that the detention of the petitioner was lawful within the requirements recently announced by this Court in the so-called "Stop and Frisk" cases. Even if that were not so, the precedents, here and throughout the nation, uniformly hold that exclusion of a confession is not required solely because of an illegal detention; confessions, such as those herein, found on the totality of circumstances to be voluntary are admissible into evidence. Precedents also teach that a change in the law would have prospective application only. Any such change, unlike the usual situation, should not benefit the petitioner because his case happened to be the one chosen for review. For he failed to raise the Fourth Amendment issue in a timely fashion, incidentally depriving the prosecution of an opportunity to meet the claim fairly, or to demonstrate that no such question is really involved herein.

ARGUMENT

The petitioner's confessions were constitutionally admissible into evidence.

The record establishes that the petitioner Melvin Morales readily and repeatedly confessed, even by reenactment, a brutal murder he had committed during the course of robbing a woman, which activity netted him a few dollars for the purchase of narcotics needed to appease his habit temporarily—a plain case of felony murder [former N.Y. Penal Law, §1044, subd. 2].

Needless to say, prosecution evidence respecting the petitioner's confessions—oral, handwritten and gesticulatory—played an integral part in obtaining the conviction of Morales, and, as will be demonstrated below, a negative reply is in order to the question before this Court: whether the admission into evidence of those incriminatory utterances and acts violated petitioner Morales' rights under the Fourth, Fifth or Sixth Amendments. In resolving such claims in the light of the Fourteenth Amendment's guarantee of due process of law, factual resolutions of evidentiary conflicts in state courts are traditionally given substantial effect here, but they, of course, are not binding upon this tribunal [see, *e.g.*, *Clewis* v. *Texas*, 386 U.S. 706, 87 S. Ct. 1338 (1967); *Haynes* v. *Washington*, 373 U.S. 514, 83 S. Ct. 1963 (1963); *Blackburn* v. *Alabama*, 361 U.S. 206, 80 S. Ct. 274 (1960); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S. Ct. 921 (1944)].

In our judgment, the obligation to review the state fact-finding procedures herein may be discharged *viz a viz* petitioner's Fifth and Sixth Amendment claims without any foreseeable difficulty, for the record is relatively complete on that score and because Morales has indicated his willingness to have the pertinent issues resolved on the basis of "only the prosecution version of the facts as representing the totality of circumstances" (brief, p. 34). The Fourth Amendment question may prove a bit troublesome. That is because the New York Court of Appeals, as indicated earlier herein, was the first state tribunal to be confronted with the problem, and it deemed proof incidentally present in this record as sufficient for determining the ultimate question of law. Thus, this discussion

will commence with the plaints other than those addressed to the alleged seizure of petitioner's person. Furthermore, the Fifth-Sixth Amendment contentions must be separately resolved anyway, or at least would be relevant should this Court find a Fourth Amendment violation and yet go on to consider respondent's "attenuation" argument instead of automatically invoking the exclusionary device.

On the subject of voluntariness and of the right to counsel, we feel impelled to remark, prefatorily, that petitioner's abandonment of previously asserted allegations about physical brutality costs him nothing, for a perusal of the record will all but constrain the reader to reject the possibility that the police used such tactics [see *Greenwald v. Wisconsin*, 390 U.S. 519, 521; 88 S.Ct. 1154 (1968)].

Thus, it may be observed that prosecution evidence indicates that Morales was humanely treated at police headquarters and, of course, petitioner's brutality claim was denied under oath by the witnesses Carroll, Damm, Ferguson, Durkin, Rotker, Wasserman, Wilke and Pepe —persons with no discernible motive to commit perjury. Furthermore, the photographic evidence (Peo.'s Exhs. 14-19; 964, 970, 1312-22) bespeaks the falsity of Morales' assertions about having been physically beaten—a truism which even the petitioner acknowledged while on the witness-stand (M. Morales 964, 970; *cf.*, 1029, 1031-3). Over and above that, the relevant proof could have been interpreted by fact-finders as establishing a failure on the petitioner's part to make a prompt outcry about the alleged beatings (M. Morales 976-81; Smith 117-9), with the result that they then were entitled to consider the lack of timely complaint in the

course of assessing Morales' credibility [see *People* v. *Leonti*, 18 N.Y. 2d 384, 390, 275 N.Y. Supp. 2d 825, 222 N.E. 2d 591 (1966); *People* v. *Alex*, 260 N.Y. 425, 428-9, 261 N.Y. Supp. at 260 N.Y. 425, 183 N.E. 906 (1933)].

Understandably reluctant to challenge that proof, the petitioner instead voices arguments which we will demonstrate rely upon inferences unsupportable by the proof, selected portions only of the record, and references to scholarly opinions and writings irrelevant to this case (brief, pp. 28-36).

For example, Morales accuses Detectives Carroll and Daum of pulling "a bit of chicanery" in inducing him to write out a confession (*id.*, pp. 29-30)—clearly hyperbole in the context of the totality of circumstances [see, *e.g.*, *United States ex rel. Everett* v. *Murphy*, 329 F2d 68, 70 (2d Cir. 1964), *cert. denied* 377 U.S. 967, 84 S.Ct. 1648 (1964); *United States ex rel. Caminito* v. *Murphy*, 222 F 2d 698 (2d Cir. 1955), *cert. denied* 350 U.S. 896, 76 S.Ct. 155 (1955); *People* v. *Boone*, 22 N.Y. 2d 476, 483 (1968)].

What there is by way of evidence on this question, hardly enervates the force of the other proof demonstrating the voluntariness of petitioner's declarations. Actually, the detectives being criticized had already heard inculpatory admissions from Morales at the significant time, and no claim was ever made herein to the effect that petitioner executed the holographic statement on the strength of any promise made earlier to him. Indeed, the handwritten confession added little to the weight of prosecution evidence. Beyond that, Daum accurately advised Morales that routine procedures would most likely subject him to

questioning by the heads of the squads investigating the case and also by an assistant district attorney (Carroll 212-25H; 368-9, 437-8; Daum 451-2).. While Carroll's coaxing thereafter stressed protection from altered versions of what petitioner had already said and might later say, that detective's motivation must on this record remain a matter of gross speculation. While on the one hand it may be true that Carroll hoped to strengthen the case against petitioner; on the other hand, that detective might have felt that Morales needed assurances that he would not, for example, be charged with other crimes on the strength of distorted accounts of his remarks (*ibid*).

Another example of unfounded innuendo is petitioner's suggestion (brief, p. 35) that unfair techniques of interrogation were employed by the police in order to extract his confessions [see, *e.g., Greenwald* v *Wisconsin, supra; People* v. *Boone, supra*]. Actually, the lack of causal relationship between the methods of interrogation and the fact that Morales confessed is manifest, as witness the fact that the initial confession occurred very shortly after petitioner's arrival; that it may be readily inferred that Morales surrendered himself with a resolve to confess as a consequence of feelings of compunction, or due to religious beliefs, or for other reasons; and, that questioning following Carroll and Daum's successful efforts—conducted by police squad leaders and an assistant district attorney—was routine follow-up technique employed in Bronx County, at least in serious cases (Carroll 368; Durkin 532; Rotker 671-81).

Another instance of petitioner's overstatements upon which we deem comment somewhat worthwhile concerns

the evidence other than his own allegations on the subject of whether discomforts due to withdrawal from narcotics weakened his determination to avoid confessing. That "issue" was allegedly brought into this case by Morales' own trial testimony and his post-arraignment assertion along the same lines to a correction official (Smith 1117-9). Seemingly, the suggestion being made by petitioner is that the relevant disability became progressively more intense while he was at headquarters, and he purports to find some "credence" for his otherwise unsupported claim in the fact of his 4:00 a.m. hospital visit on October 14th, and in his refusal at the Bronx County Jail on the 20th of the same month to talk to the police about such things as what he had done with the murder weapon.

Contrariwise, however, the record reveals that Morales —who by his own statement from the witness stand could go eight to ten hours without a "shot" during the day and needed none at night (M. Morales 985-9)—showed no signs of suffering as late as the point that he was interrogated by an assistant district attorney (Rotker 107-8H). Moreover, other evidence established that the hospital visit which took place after all the sundry types of confessions had been made by Morales resulted in a diagnosis of "some signs of drug addiction" and treatment by injection of a calming agent (Solomon 1086-90). Such showings obviously militate against petitioner's suggestion. And, as a matter of fact, an "issue" along these lines was presented in the New York Court of Appeals, which tribunal expressly indicated in one opinion that it had examined the totality of the circumstances before resolving the voluntariness question against petitioner [see, *e.g.*, *Com-*

monwealth of Pennsylvania ex rel. Craig v. *Maroney*, 348 F. 2d 22, 26-8 (3d Cir. 1965), *cert. denied* 384 U.S. 1019, 86 S. Ct. 1954 (1965)].

Turning to the other incident, we submit that petitioner's change-of-heart about answering questions for the police displayed by him on October 20th is beyond any doubt too equivocal a circumstance to be of any help to this Court on the voluntariness issue. Suffice it to say by way of illustration that Morales would have it that recalcitrance would also have been his posture *viz a viz* the successful efforts to secure his confession but for the custodial interrogation and narcotics withdrawal factors; while we will hereinafter in discussing this case in the light of the Sixth Amendment suggest that a completely different inference might be drawn much more readily from petitioner's belated decision "to fight this thing." (Durkin 655-62).

Over and beyond the foregoing, there is ample evidence to support the state court finding that the petitioner had been admonished of his rights prior to any interrogation and frequently thereafter (Daum 448-9; Carroll 178-82H, 366-8; Durkin 497-8; Golly 589, 652-6; Rotker 674). While that much is conceded by petitioner (brief, p. 35), he goes on to characterize the failure to mention the availability of assigned counsel to the patently indigent Morales as a weighty factor on the voluntariness issue. But, the members of the New York Court of Appeals sharing Judge Jasen's views considered that circumstance as part of the totality on the voluntariness issue, and otherwise they appear to have followed precedent in this tribunal by explicity holding that suppression of the confession was not

required because the relevant questioning occurred post-*Escobedo* but pre-*Miranda* [*Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964); *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966); see *Davis* v. *North Carolina*, 384 U.S. 737, 86 S. Ct. 1761 (1966); *cf. People* v. *Post*, 23 N.Y. 2d 157, 295 N.Y. Supp. 2d 665, 242 N.E. 2d 830 (1968); see also, *Jackson* v. *State*, 4 Cr. L. 2370 (Tenn. Sup. Ct., January 24, 1969].

While the New York Court of Appeals did not specifically treat the subject and petitioner does not directly allege that his right to the assistance of counsel was interfered with, we feel that it would not be amiss at this juncture to illustrate the absence herein of an *Escobedo*—type violation prejudicing petitioner [see, *e.g.*, *People* v. *Baker*, 23 N.Y. Supp. 2d 307, 318-9, 296 N.Y. Supp. 2d 745, 244 N.E. 2d 232 (1968)].

At the outset, we mention a factor equally relevant on the voluntariness question—*viz.*, that Morales was, at the pertinent time, a man approaching thirty years of age who had had several years of trade school training after graduation from Junior High School and who could hardly have been a stranger to police techniques in view of his criminal record (M. Morales 883-4, 896-8, 954-8). Together with the other proof, that circumstance, it seems to us, renders totally irrelevant petitioner's citations of generalizations by courts and writers about the mental states of persons coming "into intimate contact with the police at their base" (brief, pp. 30-32). For the same reason, Morales' claim (*id.*, p. 30) that the detention was the "operative factor" inducing him to confess must be rejected.

Moreover, while he was by his own admission from the witness stand aware at the relevant time that the police had been in touch with his mother in an effort to find him, Morales nevertheless went to her place of business, thereby exposing himself unnecessarily to almost certain apprehension (*id.* 909). Additionally, Morales conceded at trial that he was loosely guarded before reaching headquarters, and the proof as a whole shows that, after arrival there, he confessed readily when approached in terms of his culpability in the eyes of God and following advice about his right to legal assistance—a right he later on expressly declined to exercise (Carroll 172-82H, 367-8; Durkin 497-8; Golly 589, 652-6; M. Morales 915).

Also, the defense produced evidence at the hearing in the form of testimony by Rebecca Morales seemingly to demonstrate that the petitioner was entitled to *Escobedo* protection as a suspect circumstanced in the accusatory stage while detained (R. Morales 111-9H). But, her assertions about the petitioner's agreeing to speak to Carroll and then also agreeing to come to her shop, all but constitute an outright defense concession that the petitioner surrendered himself to interrogation. Indeed, the possibility that a spurious defense tailored to meet *Escobedo* requirements was interposed by Morales and his mother without considering the surrender aspect is suggested by other showings herein; to wit, (1) that Morales' desire to atone for his crime finally dissipated after he was re-acquainted with the realities of prison life and after he had had an opportunity to discuss with an attorney the possible length of incarceration he was facing, and (2) that his mother was perhaps understandably determined to protect any

of her sons (Durkin 655, 659; Ferguson 730-1; L. Morales 880; R. Morales 118-H).

Other details are equally apposite to our present argument. For one thing, no request for an attorney was ever voiced by Melvin Morales. True, the state courts have found that Mrs. Morales was not permitted to talk to petitioner at the time of his detention [see *People* v. *Carbonaro*, 21 N.Y. 2d 271, 278, 287 N.Y. Supp 2d 385, 234 N.E. 2d 433 (1968)—apparently on the strength of the concession by Detective Daum that such a request might have been made (Daum 461; R. Morales 123-6H). Be that as it may, on the record as a whole, and particularly in view of defense testimony that Mrs. Morales had been discussing this case with her petitioner-son from October 4th, there can be no doubt that Morales and his family had more than ample opportunity to obtain legal assistance in any way open to them (R. Morales 114-9H, 144-52H). Moreover, no attorney was sent to the 42nd Precinct by Mrs. Rebecca Morales, who knew that location as the hub of investigatory efforts because of going there to protect her son "Snooky" (L. Morales 880).

Lastly, various facts established herein indicate that the officers who detained the petitioner were in no way seeking to deny him assistance of counsel. In that category, we place Carroll's personal doubts about the guilt of Morales and the advisements about the right to an attorney given petitioner by that detective and his partner Daum, which admonitions were couched in terms of the right being immediate but contained no reference to the availability of such service free of cost—a necessary omis-

sion in a pre-*Miranda* case [Carroll 84-7H, 178-82H, 367-8; 404-5; Daum 449].

We recognize, of course, that our "surrender" argument presupposes the presence herein of more proof on this subject than was apparently found by the members of the New York Court of Appeals who joined in Judge Jasen's opinion, but we take some comfort in the fact that Chief Judge Fuld's pervasive conclusion—that petitioner "waived his constitutional rights"—may properly be interpreted as consistent with the view we now are advancing.

Summing up on petitioner's Fifth-Sixth Amendment arguments, we urge basically that they fly in the face of overwhelming contradictory proof. We submit further that, upon scrutiny, they are readily exposed as essentially no more than a rather ingenious blend of isolated items of proof, unwarranted inferences, and the indiscriminate use of generalities culled from sundry court opinions and scholarly writings which have neither a necessary nor demonstrated relationship to the case of Melvin Morales. Accordingly, there is, we submit, no basis for rejecting the state court resolutions of testimonial conflicts or the conclusions drawn on the voluntariness issue which were consistent from the trial through the Court of Appeals stages.

We come now to the subject of petitioner's Fourth Amendment contentions.

Initially noteworthy is the fact that there has been some uncertainty heretofore about the existence of an

exclusionary rule binding on the states which may be invoked to bar receipt into evidence of a confession elicited from an accused person during an investigatory seizure effected by the authorities without having at the inception thereof satisfied constitutional prerequisites for interfering with the accused's right to privacy and to freedom of movement [see Pitler, "'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 California L.R. 579, at 589 (1968)]. Speculation began after this Court decided *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963), wherein, among other things, the confession made by a certain Blackie Toy was declared inadmissible. Thereafter, scholarly opinion emerged to the effect that the conclusion aforesaid really reflected a finding that Blackie Toy's statements had been coerced [see La Fave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters and Beyond," 67 Michigan L.R. 39, 109-114 (1968)]. Moreover, in 1967, this Court declined to pronounce on whether the pertinent *Wong Sun* rule was an expression of the supervisory powers or one of constitutional dimension binding on the states [*Ker Davis v. Texas, supra*, at 711 (n.7); *compare Traub v. Connecticut*, 374 U.S. 493, 83 S. Ct. 1891 (1967)]. On March 10, 1969, this Court made it clear that it had indeed acted in the light of the constitutional prescription against illegal seizures of the person when it ordered suppression of Blackie Toy's confession [*Ulbricht v. United States*, 394 U.S. 165, 178, 89 S. Ct. 961, (1969)].

Presently, the petitioner Morales would seemingly have this Court announce that due process of law requires invoking a *per se* exclusionary device whenever evidence was

secured from an accused during an investigative detention not justified at inception by cause sufficient to warrant arrest (brief, pp. 11-21). The supporting argument runs, in essence, along the lines that it is a "fairly common police practice" to make the "roundup or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge," with the result that only the exclusionary sanction will compel respect from law enforcement officials for the individual's constitutional right to privacy. As we have seen, the New York Court of Appeals members, excepting one, anticipated this tribunal and balanced individual versus societal rights in concluding that, in the case of crimes posing a serious threat to public safety, a person may be detained for questioning on the basis of "reasonable suspicion" provided all other constitutional imperatives were obeyed; and all members of that tribunal, either implicitly or explicitly, decried and condemned unreasonable seizures of the citizenry at large by the authorities. Thereafter, this Court, also using a balancing approach, approved the police activity known as "Stop and Frisk" under certain circumstances [*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968); *Sibron v. New York* and *Peters v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968)]. True, the cited cases involved police conduct set against a backdrop of "rapidly unfolding and often dangerous situations on city streets" [*Terry v. Ohio*, *supra* at 10], but that trilogy has clearly charted the basic approach to the solution of all new problems concerning the admissibility of evidence secured during a period of detention which was not preceded by the acquisition of probable cause to effect an arrest.

If, then, it were to be assumed herein that Morales did not surrender himself for questioning and that there was

not sufficient probable cause to arrest him formally, the problem would be whether the seizure of his person was reasonable as required by the Fourth Amendment. Moreover, an affirmative reply to that inquiry depends initially upon a finding by this Court that such an intrusion is reasonably justified because the public need outweighs the constitutional guarantee of individual privacy. Assuming such a finding, it depends further upon a demonstrated justification by the police for the detention of Morales in the form of specific and articulable facts, together with rational inferences from those facts, and those facts must pass muster under an objective standard: to wit, would they "warrant a man of reasonable caution in the belief that the action taken was appropriate?" [*Terry* v. *Ohio*, *supra* at 21-22].

Focusing on the governmental interest in connection with the broad constitutional question, the seriousness of the American crime problem cannot be exaggerated. Concern about that threat not only to the personal safety of the citizenry but also to the rule of law itself has often been expressed of late in this decade, as for example in the report on crime issued during the Presidential tenure of Lyndon B. Johnson ["The Challenge of Crime in a Free Society," A Report by the President's Commission on Law Enforcement and Administration of Justice (1967)], in Congressional enactment of the Omnibus Crime Control and Safe Streets Act of 1968 [P.L. 90-351, 82 STAT 197], and in the organized crime message submitted by President Richard M. Nixon to the Congress on April 23rd of this year [115 Congressional Record H 2949]. Despite unsettled efforts to combat the incidence of crime, such unlawful activity continues to soar at an unprecedented

rate out of all proportion with population growth [see Appendix for latest Federal Bureau of Investigation statistics, and also graphs depicting crime picture which have been reproduced from that organization's publication "Crime in the United States: Uniform Crime Reports 1967"].

Some eight years ago this Court in an opinion upon which Judge Jones relied heavily approbated recent [illegible] the Fifth and Fourteenth Amendments state detention of a suspect for questioning free of coercion [*Culombe v. Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961)]. In the course of his remarks in that opinion (handed down on the same day as the celebrated Fourth Amendment decision of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961)] Mr. Justice Frankfurter expressed some truisms which are equally valid today:

> "Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there is no one to be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be halted before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.
>
> The questions which these suspected witnesses are asked may serve to clear them. They may serve, directly or indirectly, to lead the police to other suspects than the persons questioned. Or they may become the means by which the persons questioned are themselves led to furnish proofs which will eventually send them to prison or death. In any event,

whatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths" [*Culombe* v. *Connecticut*, *supra* at 571-2].

Manifestly if police investigatory powers were to be limited in the fashion requested by petitioner, the unsolved crime rate would increase appreciably, to say the least. Hence, the governmental interest is clearer than ever before in our history.

Another factor tipping the scales in favor of societal interests is the circumstance that expanded due process protections, such as those provided by *Escobedo* and *Miranda*, today attach during periods of custodial interrogation, which limitations when honored insulate the suspect from police over reaching. Moreover, little impetus to the policy of deterrence would be added by an extension of the exclusionary rule to the limited factual context herein involved—a setting markedly less in need of sanctions than most search and seizure situations. The true evil—wanton harassment of the population—is ordinarily outside the reach of the exclusionary sanction, at least in our view.

Seemingly, treatment of an illegally seized suspect in the constitutionally mandated manner for the balance of the period of detention is conduct inconsistent with dragnet or roundup arrest. For, it taxes our credulity to believe that there is a widespread practice in our nation wherein the authorities whisk residents off the streets and into police stations indiscriminately in hopes of obtaining a

confession to a crime and, inconsistently, thereafter scrupulously observe all other constitutional rights of the individuals interrogated—a surmise not rebuttable on the instant record [*cf. Culombe* v. *Connecticut*, *supra* at 572-3]. True, the dragnet technique may be on occasions utilized in some communities, but as a practical matter that evil is called to the attention of the courts by a motion to suppress the evidentiary fruits of such an unconscionable transgression. Generally, those fruits are tangible items which are subject to the exclusionary device because of the illegal arrest, as emphasized by a recent pronouncement by this Court that could almost be termed a civil rights declaration [*Davis* v. *Mississippi*, 394 U. S. 721, 89 S. Ct. 1394, 1397 (1969)]. Where, however, such oppressive conduct results in someone's confessing, due process requirements will bar receipt into evidence of the incriminatory statement. Contrary to petitioner's contention, incidentally, this case does not present an adequate vehicle to pass upon constitutional questions emanating from arrests on open charges or for generally suspicious conduct, actions alien to New York's jurisprudence [see N.Y. Code Crim. Proc., § 177].

Repeating, roundups and dragnets of members of our populace must be condemned, but all such abuses, however, are not carried on with criminal prosecution in mind [*Terry* v. *Ohio*, *supra* at 14 (n.9)]. Where such is the purpose, that activity, it seems to us, constitutes a proscribed "general search," to use the terminology of the Fourth Amendment opinions.

Judge Jasen noted, properly in our judgment, that no dragnet problem is presented herein. A precise definition of such misconduct has yet to be drawn, but, as we see it, the number of people detained is not the sole criterion.

for each of them may have had a nexus in time, space, etc., with the crime. As for those persons detained in this case other than the petitioner Morales, the record showings, although sparse, preclude a finding that any of them was the victim of a roundup as we are using the term.[3]

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3. We now treat these incidents *seriatim*:

(A) The man called "Shorty," according to information obtained by the police shortly after the murder, had had a fight with a woman earlier that night in a bar—one apparently nearby in view of the investigating detective's ability to check out that lead and return while investigation at the scene was still in progress (Texeira 1063). While that officer testified that he had brought "Shorty" to headquarters (*ibid.*), the record is silent as to whether there was consent to be interrogated for the brief period that was seemingly involved.

(B) Augusto ("Snooky") Morales was discovered in the hallway on the thirteenth floor at just about the time Addie Brown was being pronounced dead some two floors below (Carr 320; Covello 352-3; A. Morales 153-411). There is no dispute that Augusto was asked to view the corpse and questioned at the scene, but the record is nebulous on the subject of the length of his detention (A. Morales 153-511; Texeira 1058; Black 1067). In any event, Augusto Morales was detained only until his alibi could be verified at about 2:00 p.m. on October 4th (Durkin 67-70H; A. Morales 150-71H; R. Morales 147H).

(C) Respecting the other members of the Morales family who went to police headquarters, the record is contradictory on the question of whether they went there at their own insistence as they all testified (R. Morales 147H, 801; L. Morales 880; T. Morales 859; *compare* Texeira 1058; Black 1067). Be that as it may, there is no indication therein that any of them was a suspect or ever questioned, except for the musician, Leon Morales, who it seems was asked to explain then and there his 5:00 a.m. arrival home (Texeira 1058).

(D) The record reveals that the two women who last saw the deceased alive and later became prosecution witnesses were interviewed at the station house (Durkin 668-9). No indication that those ladies were detained against their will is to be found in the record.

(E) One detective testified that, during the course of the investigation, "we rounded up several narcotics users" (Ferguson 732). Perused in context, however, the relevant portion of that officer's testimony indicates he used a colloquialism and that no more had been done than ascertain from known addicts in street conversations something that interrupted the efforts to locate the petitioner (*id.* 732-3).

Perforce, a person claiming to be aggrieved by a dragnet arrest or any other type of illegal seizure must himself have been a victim in order to have standing to complain [see, *e.g. Alderman* v. *United States*, *supra*]. Stated differently, a person detained on a constitutionally sufficient basis may not ever vicariously invoke the exclusionary rule because of invasions of the rights of others. The petitioner Morales, as we shall soon demonstrate, would lack the necessary "standing" even if it were to be assumed that the privacy right of others was infringed during investigation of this case.

Before summing up on this subject, we also wish to note that the majority of the New York Court of Appeals, quite correctly in our view and notwithstanding the patently unpersuasive retorts by Morales (brief, pp. 15-16), pointed out that there is no practical alternative to police interrogation circumscribed by due process safeguards.

In sum on this phase of the case, intrusions on the constitutionally guaranteed right to privacy are serious infringements upon the rights of individual citizens. Despite petitioner's efforts (*id.* 26-7) to lump together tangible evidence and confessions obtained during such invasions of rights by a "simple paraphrase" of language in *Byanum* v. *United States*, 262 F. 2d 465 (D.C. Cir. 1958), different considerations control. The seizure of physical evidence by effecting illegal arrests has long been denounced as unconstitutional. But, the requirements of public safety, and other considerations as well, dictate that the constitutionality of an investigative seizure of a person for interrogation about a crime already committed should be determined on

the basis of reasonableness rather than the probable cause to arrest standard. By the way, while the New York Court of Appeals would have limited such an intrusion to the case of serious crimes, we do not urge that argument: one reason being our interpretation of later remarks by this Court on a related subject [*Terry* v. *Ohio*, *supra* at 18 (n. 15)].

Now, we come to the specific case of the petitioner Melvin Morales. There is, in our judgment, sufficient relavant proof presently in the resord to conclude that the intrusion—if there was one—upon the pertinent rights of the petitioner for the purpose of interrogating him about the Addie Brown murder was reasonable within the *Terry* requirements. Before demonstrating our point, we digress momentarily to repeat that many unidentified persons were interrogated during the investigatory efforts herein (Carroll 362; Durkin 568, 668-9; Golly 586; Ferguson 745), and that the sum total of information they gave the officers working on this case does not appear now because the Fourth Amendment claim was untimely voiced. For the same reason, the prosecution has also not had an opportunity to present all the evidence that might be available on the question of whether petitioner surrendered himself for interrogation—an occurrence which would have constituted a waiver of rights or, more aptly perhaps, have prevented Fourth Amendment protection from attaching. Accordingly and also because the prosecution has at no time conceded an absence of probable cause to arrest the petitioner, we feel duty-bound to request that, in the event that this Court finds the Fourth Amendment question properly presented and also rejects all respondent's arguments herein, the matter be remitted to the state jurisdiction for

the taking of additional proof on the two issues aforesaid.

Getting back to our theme and assuming, *arguendo*, the absence of a surrender, it is clear that the petitioner Morales' appearance at the precinct was in no way occasioned by a dragnet or roundup but rather resulted from painstaking police investigation over a period of approximately nine days, which effort began to focus on Morales several days before his investigative seizure. On that subject, petitioner, it appears, would limit this Court to a consideration only of the quantum of relevant factual data possessed by Detective Carroll and that officer's subjective beliefs about Morales' culpability at the inception of the seizure (brief, pp. 13-15). While such limitations might apply in a different context, such as a "'Stop and Frisk'' case, they are beyond doubt inapplicable in the present setting. Here, the proof reveals that numerous detgctives and detective squads concerted their efforts over a span of time, during which period investigating officers exchanged relevant information (Carroll 362, see 394-5; Daum 445, 453; Durkin 488, 524-5, 568, 668-9; Golly 585-6; Ferguson 740, 745). Under such circumstances, it seems to us, the aggregate of police information which led to the decision to make the seizure is the proper circumstance to be considered [see *Lee* v. *United States*, 376 F.2d 100 (9th Cir. 1967); *Smith* v. *United States*, 358 F.2d 835 (D.C. Cir. 1965); *Williams* v. *United States*, 308 F.2d 326 (D.C. Cir. 1962)]. Furthermore, a perusal of Detective Carroll's relevant testimony (Carroll 84-5H, 404-5) will demonstrate that his uncertainty related not to the status of the petitioner as a person who had knowledge about the perpetration of that crime, but rather

that he entertained reservations about a subject upon which he could not have any certainty—*i.e.*, whether or not Morales was the murderer of Addie Brown.

Respecting the aggregate knowledge of the detectives who had a nexus with this case, it is a reasonable inference that the witness who heard the killer flee from the scene and then a door slam some floors below later communicated that information to the police in a discussion on the eleventh floor shortly after that occurrence (Wales 290, 305-10; Durkin 515). Whether that inference may properly be drawn or not, by the eighth day following the criminal homicide, the detectives had been informed by petitioner's mother that her son Melvin had been in her apartment at the time of the fatal assault (Carroll 409-17; Daum 444-8, 455-9). In addition, the petitioner was known to the detectives in question as a narcotics addict with a criminal record who might have been motivated by a craving for drugs to perpetrate the foul deed, and they penetrated the subculture of narcotics addicts just deeply enough to ascertain in street conversations that petitioner was missing from his usual haunts [Carroll 86-7H, 394-5; Durkin 524-5; Golly 617; Ferguson 732; see 740, 745].

While there is no way of knowing for sure on this record, it may also be that, when Mrs. Morales told Detectives Carroll and Daum that the petitioner had been in her apartment at the time critical herein, those officers believed that she had told a different story to Detective Ferguson earlier (see Ferguson 730-1, also 740, 745; *compare* R. Morales 848-9). In any event, Mrs. Morales' delay in informing the police about petitioner's presence in her home was properly

a circumstance to be considered by the authorities in their investigation.

Also not deducible from the record for present purposes is the significance of the information given the authorities by the "young boy," Everett Roberts. That witness gave a description fitting petitioner to some detectives on the Saturday preceding the arrest, and he was called to the precinct apparently to make an identification before Morales was taken for arraignment (Roberts 697-714); *compare* Peo's Exhs. 14-19; 964, 970, 1312-22). Anl, of course, the prosecutor's enigmatic expression, on summation, of limited faith in the reliability of Roberts is an irrelevant circumstance on the detention issue.

Accordingly, it is clear that, prior to the alleged investigative seizure of the petitioner, the police department, as an entity, had information that connected Morales in time and space with the Addie Brown murder; that he was an addict with criminal propensities; that he apparently had gone into hiding after the instant crime; and that his mother had been dilatory in revealing his presence in the apartment at the time of the murder. Such knowledge, in our view, sufficed to draw rational inferences that the petitioner was the killer being sought or that he had information about the identity of the perpetrator of the foul deed, possibly another addict with whom his life had become inextricably intertwined because of their unfortunate community of interest.

Given such circumstances, we further submit, a "reasonably cautious man" would have been warranted in

detaining petitioner for questioning. And, as we have said, the authorities may also have been acting upon an accurate description of petitioner. Thus, petitioner's detention was "reasonable" at inception. We hasten to add, again analogizing to *Terry*, that the "scope of the search" thereafter was likewise "reasonable" because all other constitutional imperatives were obeyed during interrogation of Morales, as we have demonstrated earlier.

Next, we turn to our penultimate argument in this brief; to wit, that even assuming a lack of constitutional basis for seizing Morales, the exclusionary device is not available to him because the primary taint of illegality was dissipated—or the causal link broken—by his freely exercised decision to confess. The validity of such an approach is attested to first of all by this Court's own remarks in *Wong Sun* about the Blackie Toy situation, and further by its determination that the "taint" stemming from the illegal seizure of physical evidence did not extend to the confession of Wong Sun, himself. Incidentally, we deem those considerations controlling, and not the somewhat ambiguous footnote to that opinion now cited by Morales (brief, p. 30). Moreover, the technique uniformly employed by federal and state courts in dealing with the confession-alone-type problem has been the due process approach; and where physical evidence and confessions are obtained, they permit receipt of the statements if attenuated.[4] All

4. See, *e.g.*, *Ewing* v. *United States*, 404 F.2d 625 (10th Cir. 1969); *United States* v. *Hall*, 396 F.2d 841 (4th Cir. 1968), *cert. denied* 393 U.S. 1027, 89 S.Ct. 704 (1969); *United States* v. *Thomas*, 396 F.2d 310 (2nd Cir. 1968); *Baker* v. *United States*, 393 F.2d 604 (9th Cir. 1968), *cert. denied* 393 U.S. 836, 89 S.Ct. 149 (1968); *Leonard* v. *United States*, 391 F.2d 537 (9th Cir. 1968); *Alexander* v. *United States*, 390 F.2d 101 (5th Cir. 1968); *United States* v. *Ruf-*

of that militates against petitioner's plea for a *per se* exclusionary rule *re* the context in which he is circumstanced (brief, pp. 21-28)—as does a note by the draftsmen of the American Law Institute Model Code of Pre-Arraignment Procedure (Tentative Draft No. 1, 1966) which he cites (brief, pp. 23-24). Another authority relied on by Morales (*id.* p. 26) is equally unpersuasive, for the claimed justifications for a *per se* exclusionary rule therein reflect the author's views in the era preceding *Escobedo* and *Miranda* [Broeder, "Wong Sun v. United States: A Study in Faith and Hope," 42 Nebraska L.R. 483, 485, 564- 578 (1963)].

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fin, 389 F.2d 76 (7th Cir. 1968); *United States* v. *Barhannon*, 388 F.2d 961 (7th Cir. 1968); *United States* v. *Frazier*, 385 F.2d 901 (4th Cir. 1967), *cert. denied* 390 U.S. 997, 88 S.Ct. 1207 (1968); *Hicks* v. *United States*, 382 F.2d 158 (D.C. Cir. 1967); *United States* v. *McGavic*, 337 F.2d 317 (6th Cir. 1965), *cert. denied* 380 U.S. 933, 85 S.Ct. 939 (1965); *Commonwealth of Pennsylvania ex rel. Craig* v. *Maroney*, 348 F.2d 22 (3rd Cir. 1965), *cert. denied* 384 U.S. 1019, 86 S.Ct. 1957 (1966); *Rogers* v. *United States*, 330 F.2d 535 (5th Cir. 1964), *cert. denied* 379 U.S. 916 (1964); *Burke* v. *United States*, 328 F.2d 399 (1st Cir. 1964), *cert. denied* 379 U.S. 849, 85 S. Ct. 143 (1965); *People* v. *Johnson*, 75 Cal. R. 401, 450 P.2d 865 (1969); *People* v. *Harris*, 105 Ill. App.2d 305, 245 N.E.2d 80 (1969); *Commonwealth* v. *Brown*, 354 Mass. 246, 237 N.E.2d 53 (1968); *State* v. *Mayes*, 83 Neb. 165, 159 N.W.2d 203 (1968); *Commonwealth* v. *Holton*, 432 Pa. 11, 247 A.2d 228 (1968); *Butina* v. *Maryland*, 4 Md. App. 312, 242 A.2d 819 (1968); *State* v. *Moore*, 275 N.C. 141, 166 S.E.2d 53 (1968); *People* v. *Garner*, 44 Cal. R. 217 (1965); *People* v. *Nieto*, 247 Cal. App.2d 364, *cert. den.* 387 U.S. 911 (1967); *Prescoe* v. *Maryland*, 231 Md. 486, 191 A.2d 226 (1963); *People* v. *Robinson*, 13 N.Y.2d 296, 246 N.Y.S.2d 623, 196 N.E.2d 261 (1963); *Peal* v. *Maryland*, 232 Md. 329, 193 A.2d 53 (1963); cf. *Durham* v. *United States*, 403 F.2d 190 (9th Cir. 1968); *Jones* v. *Warden*, 402 F.2d 777 (5th Cir. 1968); *Phelper* v. *Decker*, 401 F.2d 232 (5th Cir. 1968); *Coberman* v. *Maxwell*, 399 F.2d 662 (6th Cir. 1968); *Parman* v. *United States*, 399 F.2d 559 (D.C. Cir. 1968); *United States* v. *Birns*, 395 F.2d 943 (6th Cir. 1968); *Clay* v. *United States*, 394 F.2d 281 (8th Cir. 1968); *Swinney* v. *United States*, 391 F.2d 190 (5th Cir. 1968); *People* v. *Stoner*, 55 Cal. R. 897, 422 P.2d 585 (1967); *State* v. *Sherrick*, 98 Ariz. 46, 402 P.2d 6 (1965); *People* v. *Bilderbach*, 44 Cal. R. 313, 401 P.2d 921 (1965); *People* v. *Faris*, 47 Cal. R. 370, 407 P.2d 282 (1965).

Closing, we deem it perhaps not entirely without value to comment upon retroactivity in case this Court favors the absolute exclusion of voluntary confessions made during an unlawful period of detention. For one thing, our view is that the past uncertainty respecting the existence and jurisdictional scope of an exclusionary rule militates against viewing *Wong Sun* as the operative date thereof. Secondly, we feel that the considerations ordinarily leading to a prospective application of new doctrines are present in this situation [see *e.g. Desist* v. *United States*, 394 U. S. 244, 89 S.Ct. 1030 (1969); *Kaiser* v. *New York*, 394 U. S. 280, 89 S.Ct. 1044 (1969)]. Lastly, our feeling is that exclusion should not be directed in the instant case due to the failure to raise the pertinent issue in a timely fashion.

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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